

VIDEO GAMES POSE THORNY LEGAL ISSUE



By John Rafter
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A RESOLUTION enacted by the Suffolk County Legislature in November asserting that certain video games promote criminal activity, and are thus "an imminent danger to the health and safety" of Suffolk residents, has involved the county in a manufacturer's lawsuit asking \$11 million in damages.

The manufacturer, American Multiple Industries, of Northridge, Calif., states that the resolution had a chilling effect on its plans for the marketing in Suffolk of "Custer's Revenge," a video game mentioned in the resolution. The company also says that the Legislature violated its civil rights under the First and 14th Amendments of the Constitution. The suit asks \$1 million in damages from the Legislature and \$10 million from Philip Nolan of Islip, a first-term Democratic legislator, who sponsored the resolution.

A hearing on the suit is scheduled for Thursday in United States District Court for the Eastern District of New York before Judge Mark Cosantino. The case appears to be the first to test whether municipalities can, without violating Constitutional free-speech guarantees, regulate video games that they consider pose an "imminent danger" to the public.

"Custer's Revenge" depicts a video figure of a naked man that is manipulated by the player to overcome obstacles and reach the video figure of a naked Indian woman tied to a post, according to Mr. Nolan. He said that the object of the game was the rape of the figure tied to the post, which occurred with sound effects. "The crime that has been connected with the game is rape," he said.

The game was denounced during hearings on Mr. Nolan's resolution in October by the National Organization of Women, Women Against Pornography and the Victims Information Bureau of Suffolk County.

Stuart Kesten, the president of American Multiple Industries, denied that "Custer's Revenge" depicted rape. He said the year-old company had manufactured and sold about 200,000 copies of the game before selling the rights recently to another California manufacturer after "too many headaches," such as the Nolan resolution, that "diverted us from business."

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He said that "Custer's Revenge" and two other video games to which the company had also sold rights -entitled "Bachelor Party" and "Beat 'Em and Eat 'Em" - were "the first adult video games."

"All we did was, we saw a void in the marketplace and we went after it," Mr. Kesten said. The manufacturer's suit contends that, except for its "intellectual content," the "Custer's Revenge" game is "indistinguishable from the millions of such games" advertised and sold in the United States, and "entitled to be protected from governmental suppression by the free speech and press provisions" of the First Amendment.

The suit also asserts that the game is "a medium for the communication of ideas, expression and entertainment which is neither intended to incite or produce imminent lawless action nor is capable of doing so."

It further asserts that wholesalers had been prepared to place orders for the game in time for the holiday shopping season, but did not "for fear of prosecution" as a result of the resolution.

Mr. Nolan's resolution also cites a video game called "Firebug," which he said encourages arson. In this game, the player is congratulated for successfully setting a vacant building ablaze.

"When a child plays a game and burns a building down and the screen says, 'Congratulations on a good fire,' I think it's rather logical to conclude that the child might get the idea that this is socially acceptable behavior," Mr. Nolan said.

His resolution directed the Suffolk County Attorney to take legal action to halt the sale and distribution of video games that promote criminal acts.

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Paul Sabatino, the assistant county attorney charged with the drafting of proposed regulations in response to the resolution, said that the County Attorney would only attempt to regulate games shown in public arcades.

"We didn't want to get into the area of trying to prohibit the sale of these particular games to individuals who would take home the cartridges," he said. "We didn't feel there would be constitutional support for that."

He said the proposed county regulations might also touch on games "with some kind of sexual orientation," although Mr. Nolan said his intent was to move only against games that promote crime. Mr. Nolan said he was not satisfied with the regulations proposed by the County Attorney.

Mr. Nolan sponsored a second resolution, also enacted in November, that called on the Suffolk County Consumer Affairs Advisory Council to develop voluntary guidelines for video games. But, according to the County Consumer Affairs Commissioner, Kenneth Rosenblum, the council concluded that "there is no actual present problem in Suffolk County" with games such as "Custer's Revenge," which he said was not on view or for sale anywhere in Suffolk County, and "Firebug," which was available from only one dealer in the county.

A spokesman for Muse Software of Baltimore, the company that manufactured "Firebug," said his company withdrew the game from the market well before the Suffolk Legislature passed Mr. Nolan's resolution. "It was only on the street for about two weeks," the spokesman said. "As soon as we got the first negative response, we changed it."

The game, which may only be played on an Apple II computer, was the object of protests by firemen's associations. The spokesman said that the company now marketed a game based on the same computer program, called "Firefly."

"It never was a hot mover," said Keith Bubb, the manager of Computerland in Commack. "In fact, it's one of the worst games I've ever seen." The store stocked "Firebug" until recently. Copies are still available from the Computerland store in Carle Place.

Mr. Rosenblum said the council had recommended that the county get in touch with video game manufacturers and ask them to label games in a way that made their content clear. He said the council had declined Mr. Nolan's suggestion that it rate video games in a way similar to how movies are rated.

Mr. Kesten of American Multiple Industries said that "Custer's Revenge" was contained in a package that advised it was not intended for sale to minors.

The senior assistant county attorney, Martin Ashare, who will represent the Legislature in the court action, said the suit erroneously assumed that the county had taken action to prohibit the sale of "Custer's Revenge."

He added, "I really think this is a publicity lawsuit intended to spur the sales of video games, which according to the media have been slumping."

Nonetheless, Mr. Ashare and other assistant county attorneys have had to devote time to preparations for the case. Mr. Sabatino said the county would move for dismissal of all the charges at Thursday's hearing.

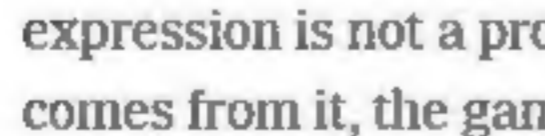
Suffolk lawyers asked to venture opinions on the wisdom of the Nolan resolution said they thought it unlikely that the Legislature, in merely asking the County Attorney to seek legal means to stop the sale of certain video games, had violated the civil rights of the manufacturer. But they said that proving in court that certain video games posed an "imminent danger" to the public would not be easy.

"All rights are encumbered with obligations," said Daniel J. Loughlin, a partner in the Babylon law firm of Fishel, Loughlin & Bowers. "If the Legislature can show that this particular expression is not a protected expression because of the danger that comes from it, the games can be restricted." He said that the Legislature must prove, in effect, that the games commit an offense similar to yelling "fire" in a crowded theater.

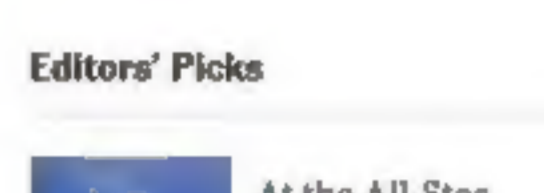
Mr. Nolan said he had been advised by County Attorney David Gilmartin to hire his own lawyer, though he will benefit, too, from county representation. Faced with a \$10 million damage charge, Mr. Nolan said he stood by his resolutions. "I did the right thing," he said. "That will carry me through."

But, he added, he is not cheered by his liability. "You go day to day with this thing hanging over your head like a dark cloud, and it doesn't do anything positive for your outlook," he said. "But I believe we acted in a professional, responsible manner, and I don't believe the law punishes you when you do that."

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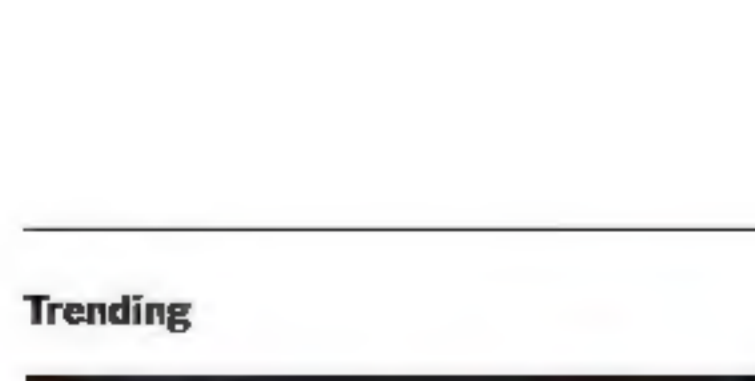


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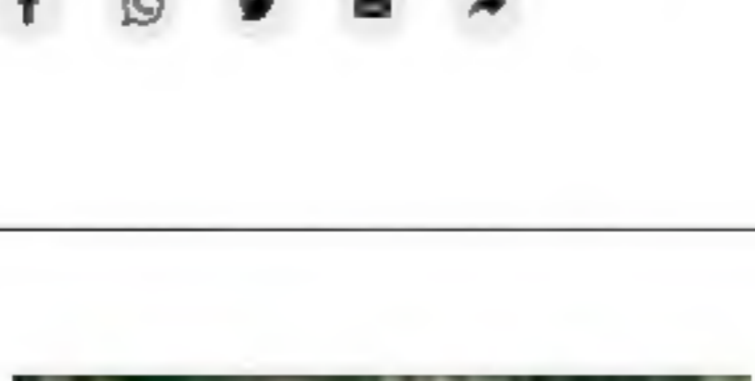
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